

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

FRANCIS SHIVERS,

Plaintiff and Appellant,

v.

ANGELA GARBER et al.,

Defendants and Respondents.

B202195

(Los Angeles County
Super. Ct. No. BC368412)

APPEAL from a judgment of the Superior Court of Los Angeles County.
Soussan G. Bruguera, Judge. Affirmed.

Law Offices of Sanford M. Passman and Sanford M. Passman; Law Offices of H.
Jason Cohen and H. Jason Cohen, for Plaintiff and Appellant.

Nemecek & Cole, Jonathan B. Cole and Susan S. Baker; Orrick, Herrington &
Sutcliffe, Kent Goss and Christopher J. Chaudoir, for Defendants and Respondents.

Defendants and respondents Ronald A. Litz and the Law Offices of Ronald A. Litz, on behalf of defendant and respondent Angela Garber, filed a personal injury action for assault, battery, sexual battery, and intentional infliction of emotional distress against plaintiff and appellant Francis Shivers (*Garber v. Shivers*).¹ Respondents dismissed *Garber v. Shivers* without prejudice. Appellant thereafter brought this action for malicious prosecution and intentional infliction of emotional distress against respondents (the underlying action). The trial court granted respondents' anti-SLAPP motion to strike the complaint in the underlying action. (Code Civ. Proc., § 425.16.)² Appellant appeals from that order, contending that the trial court erred in finding he was not likely to prevail on the merits of his claims in the underlying action. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

We state the facts in accordance with the rules of appeal from a ruling on an anti-SLAPP motion.³ In December 2004, appellant filed a petition to dissolve his marriage to Laura Perrette (the dissolution action). Perrette, who is not a party to these proceedings, was represented in the dissolution action by Litz.

In July 2004, while the dissolution action was pending, appellant became involved with Garber. Emails indicate that the relationship lasted at least through 2005. In January 2006, Garber gave a recorded statement to Private Investigator Stephen Jaffe, a

¹ Litz and the Law Offices of Ronald A. Litz are referred to collectively herein as Litz; Litz and Garber are referred to collectively as respondents.

² Code of Civil Procedure section 425.16 is known as the anti-SLAPP statute. SLAPP is an acronym for Strategic Litigation Against Public Participation, which has been adopted by our Supreme Court. (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 57, fn. 1; *Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1109, fn. 1.)

³ We “ ‘accept as true the evidence favorable to the plaintiff [citation] and evaluate the defendant’s evidence only to determine if it has defeated that submitted by the plaintiff as a matter of law.’ [Citation.]” [Citation.]” [Citation.]” (*Feldman v. 1100 Park Lane Associates* (2008) 160 Cal.App.4th 1467, 1478 (*Park Lane*).)

friend and business associate of Perrette's, describing her relationship with appellant. Garber told Jaffe that she first saw appellant when he was performing a concert on July 12, 2004; the next day, she made contact with appellant through his MySpace page and gave him her cell phone number; on July 14th, appellant picked Garber up at a party and brought her to a house in Hollywood and they had consensual sex; about a week later, appellant made arrangements to pick Garber up at her home in the San Fernando Valley; when he arrived, he forced Garber get into the trunk of his car and drove her back to the Hollywood house; he forced Garber into the house where he beat and sexually assaulted her; after using a lighter to heat Garber's star shaped earrings and brand stars into her arm, appellant drove her home; after this incident, Garber and appellant remained in frequent email and cell phone contact; Garber told Jaffe about several subsequent instances in which appellant forced her to ride in the car trunk, beat her, humiliated her in various ways, and sexually assaulted her.

In February 2006, a copy of Garber's statement to Jaffe was provided to the Los Angeles Police Department. In June 2006, Garber told Litz about the assault and in July 2006, Litz received a copy of the statement Garber gave to Jaffe.⁴ On July 20, 2006, after reviewing Garber's statement, Litz filed *Garber v. Shivers* on Garber's behalf. In the verified complaint, Garber alleged, among other things, that appellant sexually assaulted her on July 24, 2004. In January 2007, Garber dismissed *Garber v. Shivers* without prejudice on the eve of her deposition.⁵

In March 2007, appellant filed the underlying action, the gravamen of which was that respondents filed *Garber v. Shivers* without probable cause and with the intent to cause appellant physical and mental distress. Specifically, he alleged that depositions

⁴ Litz was introduced to Garber by Perett, but the record does not indicate when this occurred or how Perett became acquainted with Garber.

⁵ Meanwhile, in August 2006, Garber filed declarations in support of a restraining order Perrette was seeking against appellant in the dissolution action. Garber's declarations described events which formed the basis of her lawsuit against appellant. Perrette's request for a restraining order was granted.

given by witnesses Kristy Graham and Lisa Lynch in the dissolution action contradicted the allegations of *Garber v. Shivers*, as well as the declaration Garber filed in the dissolution action, but that respondents “continued to unjustifiably prosecute the non-meritorious” *Garber v. Shivers* case.

In June 2007, Litz filed the anti-SLAPP motion, in which Garber joined. Litz and Garber both submitted declarations in support of that motion. In her declaration, Garber averred that she “suffered extreme abuse and harassment at the hands of [appellant], including without limitation, each of the acts described in the verified complaint in [*Garber v. Shivers*] and my declaration filed in support of a restraining order in favor of Ms. Laura Pauline Perett in the [dissolution action]” Garber explained that she dismissed *Garber v. Shivers* because “after careful consideration and deliberation, I determined that I did not want to relive the abuse suffered at the hands of [appellant] by having to continue to testify about it. I also feared having to face [appellant] under any circumstance. [¶] . . . As a result, I decided to try and put the past behind me and dismiss the case against [appellant].”

In his declaration submitted in support of the anti-SLAPP motion, Litz averred that he filed *Garber v. Shivers* on Garber’s behalf because he “believed uncategorically that the facts Ms. Garber had relayed to me gave rise to claims for damages against [appellant]. Moreover, I had no reason to doubt Ms. Garber’s story as I had seen evidence of [appellant’s] destructive relationship with my client, Ms. Perrette, and had seen the photographs of Ms. Garber’s physical scars.” When Garber’s deposition was noticed in *Garber v. Shivers*, Garber told Litz that she “did not want to appear for deposition given her fear of [appellant] and her desire to move on with her life. When I learned that Ms. Garber was unwilling to face [appellant] or be deposed, [*Garber v. Shivers*] was expeditiously dismissed. It was not dismissed because I questioned the merits of the case, but solely out of respect for my client’s fear of confronting [appellant] and her desire to move on with her life.”

In opposition to respondents’ anti-SLAPP motion, appellant maintained that the allegations in *Garber v. Shivers* were “wholly inaccurate and untrue” and he described a

consensual relationship with Garber. Appellant attached copies of emails purportedly sent to him by Garber, including one dated July 25, 2004 (the day after Garber alleged in her complaint appellant sexually assaulted her), in which Garber seems to apologize for missing appellant's phone call the night before.⁶ According to appellant, this email established that defendant was not with Garber on the day she alleged he sexually assaulted her. Appellant also submitted the declarations of Graham and Tina McCormick, Garber's former roommates. Graham averred that Garber lived in the apartment Graham shared with McCormick from March 2005 through February 2006, during that time Garber expressed romantic feelings for appellant and sent him affectionate emails; Garber never told Graham that Shivers had assaulted her; Garber abused drugs and intentionally cut herself. McCormick confirmed that Garber spoke of Shivers in romantic terms during this time period, sent him affectionate emails, and never mentioned that he assaulted her.

In July 2007, the trial court granted respondents' anti-SLAPP motion. It found that the allegations that form the basis of both the malicious prosecution and intentional infliction of emotional distress causes of action fell within the ambit of the anti-SLAPP statute, and that appellant failed to establish a probability of prevailing on the merits of his claims. As to the malicious prosecution cause of action, the trial court reasoned that appellant did not establish that *Garber v. Shivers* was terminated in his favor; was filed and prosecuted without probable cause; or was filed with malice, the three elements of a malicious prosecution cause of action. As to the intentional infliction of emotional distress cause of action, it reasoned that the claim was barred by the litigation privilege (Civ. Code, § 47). Judgment was entered on July 24, 2007.

Appellant filed a timely notice of appeal.

⁶ In a reply declaration, Garber states: "I did write this email apologizing for not returning Shivers' telephone call the night before the email was sent. Shivers was extremely angry with me and the email did not help. As a result of my failure to return his telephone call and despite my email apology, Shivers beat me. This was the first of many beatings."

DISCUSSION

A. *The Trial Court Properly Granted the Anti-SLAPP Motion Because Appellant Failed to Establish a Probability of Prevailing on Either of His Claims*

Appellant contends the trial court erred in granting respondents' anti-SLAPP motion. As we understand his argument, it is that the July 25, 2004 email Garber sent to appellant conclusively established that he did not physically meet Garber on July 24th; since they did not meet on that day, he did not assault her as she alleged in *Garber v. Shivers*; since there was no assault on July 24th, respondents did not have probable cause to file *Garber v. Shivers*; since respondents filed *Garber v. Shivers* without probable cause, they must have done so maliciously; respondents' dismissal of *Garber v. Shivers* was a favorable termination on the merits because it was the result of respondents' awareness that they could not prove appellant assaulted Garber on July 24th; thus, appellant demonstrated a probability of prevailing on his claims. We disagree with appellant's ultimate point.

Code of Civil Procedure section 425.16, subdivision (b)(1) provides: "A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim."

Trial courts engage in a two-step process when evaluating an anti-SLAPP motion. First, the trial court decides whether the defendant has made a threshold showing that the challenged cause of action arises from protected activity. If so, the next step is to determine whether the plaintiff has demonstrated a probability of prevailing on the claim. (*Park Lane*, *supra*, 160 Cal.App.4th at p. 1477; see also *Gilbert v. Sykes* (2007) 147 Cal.App.4th 13, 22, 26.)

Here, appellant does not take issue with the trial court's finding that respondents' conduct of filing of *Garber v. Shivers* was a protected activity falling within the ambit of

the anti-SLAPP statute. (*Park Lane, supra*, 160 Cal.App.4th at p. 1478 [pleadings in connection with civil litigation are covered by the anti-SLAPP statute without respect to whether the litigated matter concerns a matter of public interest].) Thus, the burden shifted to appellant to establish a probability that he would prevail on the merits of his claims in the underlying action. He failed to meet this burden as to both his malicious prosecution and intentional infliction of emotional distress claims.

Appellant's intentional infliction of emotional distress claim fails because Civil Code section 47, subdivision (b) creates an absolute privilege for a "publication or broadcast" made as part of a "judicial proceeding." Known as the litigation privilege, Civil Code section 47, subdivision (b) immunizes defendants from derivative tort liability based on theories of intentional infliction of emotional distress arising from the filing of a lawsuit. Where a plaintiff's action is barred by the litigation privilege, the plaintiff cannot demonstrate a probability of prevailing under the anti-SLAPP statute. (*Park Lane, supra*, 160 Cal.App.4th at p. 1485.) Since appellant's intentional infliction of emotional distress cause of action is derived from the filing of *Garber v. Shivers*, it is barred by the litigation privilege, and appellant cannot demonstrate a probability of prevailing on that cause of action.

Likewise, appellant cannot establish a probability of prevailing on his malicious prosecution cause of action. There are three elements to a malicious prosecution cause of action which the plaintiff must prove: (1) the action was commenced by or at the direction of the defendant and pursued to a legal termination in the plaintiff's favor; (2) it was brought without probable cause; and (3) it was initiated with malice. (*Plumley v. Mockett* (2008) 164 Cal.App.4th 1031, 1047.) "Probable cause is a legal question to be resolved by the court; malice is a factual question to be resolved by a jury. [Citations.]" (*Ibid.*) Probable cause exists if any reasonable attorney would have thought the claim tenable. "Only those actions that 'any reasonable attorney would agree [are] totally and completely without merit' may form the basis for a malicious prosecution suit. [Citation.]" [Citation.]" (*Id.* at p. 1048.)

Apart from whether appellant could establish the favorable termination or malice elements of a malicious prosecution action, he has failed to establish that respondents lacked probable cause to commence *Garber v. Shivers*. This is because, notwithstanding his protestations of innocence, the allegations of the verified complaint, and of Garber's and Litz's declarations in support of the anti-SLAPP motion, are sufficient to establish that Garber had at the very least a tenable claim against appellant. Appellant's assertion that the claims were untrue is simply not enough to show a lack of probable cause. And contrary to appellant's assertion, that Garber dismissed the complaint without prejudice does not lead inevitably

to the conclusion that she did not have probable cause to commence the action in the first place. Having failed to establish the lack of probable cause element of his malicious prosecution cause of action, appellant has failed to demonstrate a probability that he would prevail on the merits of his claim.

DISPOSITION

The judgment is affirmed. Respondents shall recover their costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

RUBIN, J.

WE CONCUR:

COOPER, P. J.

FLIER, J.